



# The Robert L. Levine Distinguished Lecture Series, Lecture, Race Relations Law in the Canon of Legal Academica

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# LECTURE

## RACE RELATIONS LAW IN THE CANON OF LEGAL ACADEMIA

*Randall Kennedy\**

Should a course on race relations law be part of the curricular canon of a law school? If so, what should such a course offer? If such a course is offered, with what political and pedagogical attitude should it be taught? These are the primary questions addressed in this Essay.

### I.

Law schools should equip students with knowledge and techniques that the legal academy is well positioned to explore and impart and that will be of benefit to society. From this premise it follows that a law school should offer a course that investigates the ways in which race relations have affected and have been affected by legal institutions, particularly the judiciary. After all, racial conflicts and efforts to regulate them have played a large and ongoing part in the development of American common law, statutory law, and constitutional law. On one level, this is an obvious point. Anyone with an appreciable knowledge of the United States knows that race matters and has long mattered to Americans. On another level, even well-educated people are often unaware of the pervasiveness of the influence of racial conflict upon Americans' preferences, habits, conduct, and institutions. Many are aware at some vague, abstract level that racial "slavery" and "segregation" and other forms of "oppression" have mocked the high-minded ideals voiced in the foundational documents of the United States. Relatively few, however, receive instruction in secondary schooling or college that enables them to have a vivid and detailed understanding of these evils and of their ramifications.

Law schools should also allocate substantial resources to the study of race relations law because of the peculiarly influential role of

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attorneys in the United States. Attorneys constitute a significant group even when they stay within a narrow professional niche; after all, one of the three branches of federal power, the judiciary, is virtually an exclusive preserve of attorneys. The influence of attorneys as a group, however, extends far beyond the judiciary insofar as many lawyers pursue careers in legislatures, administration, journalism, and business. Given the depth, complexity, and pervasiveness of racial controversies in the United States, an attorney who is ignorant of "The American Dilemma" is an attorney with a deficient education. Given the influence of lawyers, the prospect that an appreciable number of them might be undereducated about a matter that is so vital to American democracy is a cause for concern and an impetus to support the study of race relations law.

Wherever one turns in the legal universe, one encounters disputes that have often reached their most intense pitch in the crucible of struggles over "the race question." Americans have come to blows with one another over a variety of divisions—for example, class conflict, gender distinctions, ideological splits, and religious differences. It was disagreement over the fate of racial slavery, however, that erupted into civil war. The effort to re-create a shattered union in the aftermath of that war led to three amendments to the United States Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments—that fundamentally changed the relation of the individual to state and federal governments and the relation of the states to the central government. A very large portion of constitutional law today stems from this transformation. This includes not only judicial, legislative, and executive actions that are explicitly racial in nature, but also most of the actions taken by states that are alleged to violate the federally guaranteed rights of individuals.<sup>1</sup> A course on race relations and the law should be a central curricular offering at every law school because every lawyer should know, as part of his or her mastery of the key elements of American legal institutions, that the struggle against racial injustice has been *the* great seedbed for advances in civil liberties and civil rights for all persons.

Responses to racial abuses of power have led to the creation of much of the law that protects due process and freedom of expression.<sup>2</sup> Such responses have also led to important achievements in other areas. Citizenship, for example, is a fundamental legal status. It distinguishes members of a polity from those who are non-members.

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1. See Clement Eaton, *The Freedom-of-Thought Struggle in the Old South* 118-43 (rev. & enlarged ed., Harper & Row 1964) (1940); Randall Kennedy, *Race, Crime, and the Law* 29-135 (1997).

2. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 25-26 (1986); Eric Foner, *The Story of American Freedom* 163-93 (1998); Harry Kalven, Jr., *The Negro and the First Amendment* 65-121 (1965); William Lee Miller, *Arguing About Slavery: The Great Battle in the United States Congress* 491-514 (1996).

It thus implicates what Michael Walzer describes as the most important questions in adjudicating matters of distributive justice: Who constitutes the relevant community and how is that community constituted?<sup>3</sup>

The Constitution of 1787 neglected to define national citizenship. In the infamous case of *Dred Scott v. Sandford*,<sup>4</sup> however, the Supreme Court decided that whatever the full meaning of national citizenship, it meant at least the exclusion of African Americans.<sup>5</sup> Blacks, the Court ruled, whether enslaved or free, could never become citizens of the United States.<sup>6</sup> To change that radical act of rejection required a constitutional amendment. The Fourteenth Amendment declares that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States."<sup>7</sup> Birth-right citizenship is a distinctive feature of American political culture. Without a knowledge of race relations and its effect on legal developments, one cannot understand satisfactorily the roots of this definition of American citizenship and the reason proposals that even consider changing it generate high anxiety, if not outright condemnation.<sup>8</sup>

Being born in the United States is not the only way to become a citizen; one can also attain citizenship through naturalization. The history of naturalization is another story significantly shaped by racial conflict. From 1790 until 1952, federal law stipulated that, with certain exceptions, a person had to be "white" in order to be eligible for naturalization.<sup>9</sup> The enforcement of this law created a jurisprudence of racial classification that deemed people of certain nationalities or ethnicities to be "white"—and therefore eligible for

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3. See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 31-35 (1983).

4. 60 U.S. 393 (1856).

5. See *id.* at 406-07.

6. See *id.*

7. U.S. Const. amend. XIV, § 1.

8. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 2-3, 63-83 (1985); see also Gerald L. Neuman, *Back to Dred Scott?*, 24 San Diego L. Rev. 485, 485-86 (1987) (reviewing Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985)).

9. In 1870, for example, Congress made persons born in Africa and persons of African descent eligible for naturalization. See Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L.J. 237, 245 & n.40 (1994). As anticipated, however, in the nineteenth century, relatively few people in these categories immigrated to the United States and became naturalized citizens. In the twentieth century, the numbers have grown but are still strikingly small in comparison with peoples from other areas of the world. See *id.* at 240; see also Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. Pa. L. Rev. 237, 238-41 (1945) (examining the origin and development of racial restrictions on naturalization).

citizenship—and people of other nationalities or ethnicities to be “nonwhite”—and therefore doomed to permanent status as aliens.<sup>10</sup>

Many people take for granted the demographics of the United States, as if the character of the population was merely an accident of history. A properly constructed course on race relations law would teach students that, to a substantial extent, racial considerations have shaped immigration policies.<sup>11</sup> For example, absent the anti-Chinese animus that led to the Chinese Exclusion Act of 1882<sup>12</sup> and the anti-Japanese prejudice that led to the Japanese Exclusion Act of 1924,<sup>13</sup> there would be a considerably larger presence of Asian Americans in the United States today.<sup>14</sup> Many people also take for granted the geography of the United States, as if that, too, simply emerged as a fact of nature. A good course on race relations law, however, would show that racial conflict significantly shaped the negotiations, transactions, and conquests pursuant to which the United States, dominated by “white” people, wrested a continent away from various peoples who were perceived as colored: the “red” Indians and the “brown” Mexicans.<sup>15</sup>

Many people take for granted their racial identity and that of their friends, kin, lovers, and neighbors. A comprehensive course on race relations law would show, however, that in substantial numbers of cases, the question “Who is ‘white’?” or “Who is ‘colored’?” has generated sharp conflict, giving rise to some of the most poignant disputes in all of American law.<sup>16</sup> Consider, for example, *Green v.*

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10. See Ian F. Haney López, *White By Law: The Legal Construction of Race* 116-33 (1996).

11. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 275-76 (1996).

12. Act of May 6, 1882, ch. 126, 22 Stat. 58 (Chinese Exclusion Act of 1882), *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

13. Immigration Act of 1924, ch. 190, 43 Stat. 153, *repealed by* Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, tit. IV, § 403(a)(23), 66 Stat. 163, 279.

14. See Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy 1850-1990*, at 43-49 (1993).

15. See Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism 189-90*, 231 (1981).

16. See, e.g., F. James Davis, *Who is Black? One Nation's Definition* 1-16 (1991) (describing who is considered black historically in the United States); Virginia R. Dominguez, *White By Definition: Social Classification in Creole Louisiana* 23-55 (1986) (discussing the history of racial classifications); Charles S. Mangum, Jr., *The Legal Status of the Negro* 1-17 (1940) (surveying contemporary state laws defining who is a Negro); Gilbert Thomas Stephenson, *Race Distinctions in American Law* 12-25 (Negro Univs. Press 1969) (1910) (analyzing the question of “What is a Negro?”); Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 Cal. L. Rev. 1231, 1231-32, 1262-79 (1994) (exploring laws and regulations that classify by race or other grouping); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 Yale L.J. 109, 123-56 (1998) (discussing uses of racial knowledge, “evidence and essences,” physical attributes, ancestry and reputation to determine race); Christine B. Hickman,

*City of New Orleans*<sup>17</sup> which arose from the following heartrending facts. A white woman gave birth to a baby. Soon afterwards, the woman died. The woman's sister took the baby to her home and planned to raise the child. As time went on, however, the baby's skin began to darken, which led to complaints from white neighbors.<sup>18</sup> The baby's aunt soon capitulated, returning the child, a little girl, to city authorities. These authorities placed the child with black foster parents who, falling in love with her, sought to adopt the child. The authorities initially approved this effort but then resisted it when an examination of the child's birth certificate disclosed that she was registered as "white" by the state Bureau of Vital Statistics.<sup>19</sup> A Louisiana law prohibited adoption across racial lines. The foster parents sought to change the racial designation on the child's birth certificate from "white" to "colored."<sup>20</sup> But this effort, too, was thwarted. Considering that the mother was white, that the identity of the father was unknown, that experts in racial classification disagreed, that the child's racial character was ambiguous, and that initial official declarations of racial identity were entitled to a strong presumption of validity, the authorities refused to change the child's racial designation. The Louisiana Court of Appeals affirmed this ruling, stating a change in racial designation should occur only when the relevant evidence "leaves no room for doubt"<sup>21</sup> because the registration of a racial birthright "must be given as much sanctity in the law as the registration of a property right."<sup>22</sup> This ruling left the child in limbo. As a white child, she could not be adopted by the black foster parents who had grown to love her. As a person of color, she stood no chance of being accepted socially by whites in segregationist Louisiana, regardless of what her birth certificate

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*The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161, 1164-66 (1997) (discussing the rise of a biracial population in the United States and its effect on traditional racial classifications); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. Am. Hist. 44, 48-67 (1996) (discussing what constitutes race in the context of anti-miscegenation laws); John C. Calhoun, Note, *Who is a Negro?*, 11 U. Fla. L. Rev. 235, 235-40 (1958) (reviewing elaborate definitions in anti-miscegenation statutes and recommending standardization); Chris Ballentine, Note, *"Who is a Negro?" Revisited: Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. Fla. L. Rev. 683, 685-90 (1983) (examining racial criteria for affirmative action programs).

17. 88 So. 2d 76 (La. Ct. App. 1956).

18. See *id.* at 77.

19. See *id.*

20. See *id.*

21. *Id.* at 80 (quoting *Treadaway v. Louisiana State Bd. of Health*, 56 So. 2d 249, 250 (La. Ct. App. 1952)).

22. *Id.* at 81 (quoting *Treadaway v. Louisiana State Bd. of Health*, 61 So. 2d 735, 739 (La. 1952)).

stated. Few cases illustrate more vividly the cruel lunacy of American pigmentocracy.<sup>23</sup>

Granted the significance of the race question in American legal culture, why explore it in a specialized course? Might such a course be relegated to an academic ghetto by professors and students who perceive it as a sop to "political correctness?" Why not explore the subject throughout the law school curriculum?

Exploring the racial dimensions of a subject ought to be done wherever pursuing such a tack would be enlightening given the aims at hand. For example, if one seeks, in a course on contracts, to investigate the duty to speak, misrepresentation, caveat emptor, and related concepts, one might well do so in the context of cases in which men have sought to escape matrimonial obligations on the grounds that wives or fiancées had concealed or failed to disclose their racial ancestries.<sup>24</sup> A teacher of property concerned with exploring arguments for and against various modes of governmental regulation of housing markets, should certainly consider using, as heuristic vehicles, the laws that prohibit racial discrimination in housing transactions.<sup>25</sup> A teacher of civil procedure can do no better than *Walker v. City of Birmingham*<sup>26</sup>—a case arising from racial conflict on a grand scale—in terms of introducing students to the collateral bar rule.<sup>27</sup> A teacher of torts, interested in generating lively and instructive class discussion on the intentional infliction of emotional

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23. See generally Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 Yale L.J. 1, 24 (1998) (discussing and defining "pigmentocracy").

24. See, e.g., *In re Monks' Estate*, 120 P.2d 167, 169 (Cal. Dist. Ct. App. 1941) (contesting a will on the grounds that the decedent's marriage violated anti-miscegenation laws); *Theophanis v. Theophanis*, 51 S.W.2d 957, 958 (Ky. 1932) (analyzing a husband's allegation that he was never married to his wife because she was a mulatto); *Sunseri v. Cassagne*, 185 So. 1, 4-5 (La. 1938) (analyzing a husband's suit to annul his marriage because his wife was a member of the negro race); *Van Houten v. Morse*, 38 N.E. 705, 705 (Mass. 1894) (discussing the defense of breach of promise to marry based on plaintiff's alleged concealment of "some negro blood in her veins"); *Ferrall v. Ferrall*, 69 S.E. 60, 62-63 (N.C. 1910) (Clark, J., concurring) (denying a husband his request to annul his marriage because of his wife's alleged African American ancestry).

25. For a first-year casebook on property law that spends a considerable amount of space exploring issues involving racial conflict, see Joseph William Singer, *Property Law: Rules, Policies, and Practices* (2d ed. 1997). See also *Race, Poverty, and American Cities* (John Charles Boger & Judith Welch Wegner eds., 1996) at ix-xi (suggesting that problems of urban unrest are rooted in poverty and race); Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (1959) *passim* (discussing racism with respect to property and restrictive covenants).

26. 388 U.S. 307 (1967).

27. See generally Alan F. Westin & Berry Mahoney, *The Trial of Martin Luther King* (1974) (telling the story of King's arrest in Birmingham for defying a court order not to parade without a permit).



distress, should consider including in the syllabus one or more of the many cases in which the word "nigger" has prompted a lawsuit.<sup>28</sup>

There are many other contexts in which, outside of a course specifically devoted to race relations, the race question can be usefully explored. In a course on jurisprudence, one may consider including in the syllabus cases, speeches, and other materials generated in the eighteenth and nineteenth centuries by American combatants for or against slavery—for example Nat Turner, David Walker, John Brown, John C. Calhoun, William Lloyd Garrison, and Jefferson Davis—to probe the conditions under which people are obligated to obey the law or justified in taking up arms against the state. In teaching a course on professional responsibility, an instructor might want to ask whether an attorney's Jewishness ought to figure into her decision to accept or decline as a client a bank accused of hiding Nazi war loot or whether an attorney's "blackness" ought to figure into his decision to accept or decline as a client a firm charged with illegal racial discrimination in hirings or promotions.<sup>29</sup>

Hence, without any sort of overreaching, there exist many opportunities for professors teaching basic subjects to highlight the racial aspects or consequences of a given problem or doctrine. Teachers should seize upon these occasions when it furthers the academic mission of the project at hand. It is unlikely, however, that professors teaching a course on contracts, torts, civil procedure, and so on, will have time to assess comprehensively the distinctly *racial* aspect of their subject, for example the development of various racial ideologies within the American judiciary. After all, the primary aim of a course on contracts or torts or civil procedure is to develop a mastery of those subjects. Although studying racial conflict may illuminate an area of those subjects, they encompass far more territory than even the large area of racial conflict. To study as a primary focus of inquiry the relationship between race relations and the law, a

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28. See *Johnson v. Fambrough*, 706 So. 2d 739, 741 (Ala. Civ. App. 1997); *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216, 217 (Cal. 1970); *Motley v. Flowers & Versagi Court Reporters*, No. 72069, 1997 Ohio App. LEXIS 5542, at \*3 (Ct. App. Dec. 11, 1997); see also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 133 (1982) (citing racial epithet cases); Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 Harv. C.R.-C.L. L. Rev. 585, 585 (1983) (responding to Professor Delgado's article); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 449-57 (analyzing the debate over how to handle the increasing number of racist speech incidents on college campuses); Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 Colum. L. Rev. 1749, 1752 n.17 (1985) (citing racial epithet cases).

29. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1602 (1993); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 Geo. Wash. L. Rev. 1030, 1033 (1995).

school needs a stand-alone course, a course in which the race question itself can be at the center of attention.

## II.

The canon of race relations law in the United States should consist of materials that convey an understanding of the ideas, events, movements, and personalities that are essential for an appreciation of the large influence of race relations upon American legal culture. This field is too massive to cover comprehensively in any one casebook, monograph, or course. Hence, the need exists in this field, as in many others, for difficult choices governing the allocation of time, energy, and attention. For teachers facing the difficult task of selecting what to include, and thus what to exclude, I offer the following suggestions.

The first stems from questions posed by J.M. Balkin and Sanford Levinson. In *Canons of Constitutional Law*, after describing Chief Justice Roger Taney's opinion in *Dred Scott v. Sanford* and Frederick Douglass's speech *Address at Glasgow: The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, they ask:

Should either of these two texts, or both, or neither, appear in contemporary constitutional law casebooks? Which should American law students study and discuss, which should educated citizens know about, and which should inform the work of legal academics in the present era? Which of these writings, in short, should form part of the "canon" of American legal materials?<sup>30</sup>

I agree with their conclusion that Douglass's speech warrants inclusion. I use it and have found that it adds considerable vitality to class discussions regarding slavery, anti-slavery, and the secession crisis, and in my view teachers should import into their monographs, casebooks, syllabi, lectures, and classes anything that makes the subject in question more vivid, accessible, and meaningful to their audiences. Frederick Douglass's biography and the vigor of his speech and writings make works by him an especially attractive prospect for study and discussion. Indeed, students are missing something very important if they do not have direct access to the voices and rhetorics of Douglass, Sojourner Truth, Solomon Northrup, William Wells Brown, Harriet F. Jacobs, and other black abolitionists who skillfully transmuted their experience as former slaves, runaway slaves, or semi-free ante-bellum Negroes into a distinctive critique of "The Slave Power". The same is true of the voices and rhetorics of Fannie Lou Hamer, Bayard Rustin, Malcolm X, Martin Luther King, Jr., and other champions of the Second Reconstruction. Even in a law school course focused rather narrowly

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30. J.M. Balkin & Sanford Levinson, *The Canon of Constitutional Law*, 111 Harv. L. Rev. 963, 967-68 (1998) (footnote omitted).

on legal doctrine, something important is missing if students are unaware of the substance of King's "I Have a Dream" speech or his "Letter From A Birmingham Jail."

Levinson and Balkin, however, do not answer the question of priority. As between Taney's infamous opinion and Douglass's stirring speech, they do not say which text a teacher should choose to study *more* or choose to study at all if scarcities of time, space, or attention preclude the possibility of studying both. A suitable answer depends upon the aims of the teacher. I can imagine a wonderful course on constitutional law that gives priority to Taney's opinion, and I can also imagine a wonderful course that gives priority to Douglass's speech. I would be likely to give priority to Taney's opinion on two grounds. The first has to do with the academic division of labor. My marginal intellectual advantage over colleagues in other parts of the university stems from my specialized training in the understanding and manipulation of judicial texts. I can probably best allocate the fruits of that advantage to law school students by focusing my energies primarily on such texts while using other materials as supplementary aids. The second reason has to do with my impression of the relative social significance of various documents and my choice to focus the attention of my students primarily on those things of greatest consequence. Horrible though it was, Taney's opinion has exercised more influence than Douglass's speech on the American constitutional regime and is thus a more important document for law students to know. Underlying this pedagogical judgment is my sense that of the various types of canonicity, the cultural literacy canon is the most appropriate for a teacher to embrace. According to Balkin and Levinson, the cultural literacy canon is constituted by "the materials that any educated person should know about in order to participate in and contribute to serious general discussions about American law."<sup>31</sup> For purposes of a serious analysis of the secession crisis, Taney's opinion is even more crucial to know about than Douglass's great speech.

The fact is, however, that a teacher is seldom, if ever, faced with the stark choice of discussing one text to the total exclusion of another. Usually teachers are in a position to discuss several texts at once, though they give priority to some over others. To throw useful light on classic legal texts, teachers should consider assigning stories, poems, and novels. The two classic texts concerning the federal constitutional propriety of *de jure* racial segregation are *Plessy v. Ferguson*<sup>32</sup> and *Brown v. Board of Education*.<sup>33</sup> Both are essential texts in any good course on race relations law in the United States. Neither, however, reflects vividly what segregation actually meant as a

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31. *Id.* at 977.

32. 163 U.S. 537 (1896).

33. 347 U.S. 483 (1954).

matter of day-to-day lived experience. A useful supplement that performs this task admirably is Richard Wright's collection of short stories, *Uncle Tom's Children*.<sup>34</sup> Another type of text that should be considered for inclusion is music. For example, one way of vividly illustrating the change in black consciousness reflected and nourished by the successful campaign of litigation against *de jure* segregation would be to play in a classroom Louis Armstrong's despairing 1930s rendition of *What Did I Do to Be So Black and Blue* and contrast it to James Brown's exuberant 1960s rendition of *Say It Loud, I'm Black and I'm Proud*.

My second suggestion is that law school teachers focus more attention than they currently do on lawmaking institutions other than the courts.<sup>35</sup> One cannot, for example, obtain an adequate understanding of the Reconstruction constitutional amendments and civil rights legislation by viewing them solely through the lens of Supreme Court decisions. Teachers of race relations law, and other subjects as well, should revisit the debates held in Congress and state legislatures to grasp the political and social circumstances that gave rise to these enactments and affected their design. For example, in evaluating provisions enacted, it helps to know about proposals rejected. In considering the propriety of official racial distinctions in light of the Fourteenth Amendment, it helps to know that the Thirty-ninth Congress rejected a proposed Fourteenth Amendment that would have expressly prohibited the making of racial distinctions.<sup>36</sup> Similarly, to understand adequately the Fifteenth Amendment, it helps to know that Congress rejected a version that would have provided citizens with a right to vote and instead embraced a far more limited provision which merely provides a right to be free of racial exclusions from the franchise.<sup>37</sup>

Another source of lawmaking to which scholars of race relations law ought to devote more attention is the Executive Branch. Balkin and Levinson are right to decry the marginalization of Abraham Lincoln in the legal academic canon.<sup>38</sup> Regrettable too is the marginalization of Andrew Johnson, Lincoln's successor and a fierce opponent of the nation's first federal civil rights act, and indeed, the Fourteenth Amendment. Johnson's veto message of the Civil Rights Act of 1866 is a document particularly worthy of inclusion in the

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34. Richard Wright, *Uncle Tom's Children* (Harper & Row 1965) (1940).

35. This, too, echoes a point made by Balkin and Levinson, *supra* note 30, at 1003-04. A somewhat dated text that is attentive to the need to take into account, at the state and federal levels, all lawmaking agencies, including organs of propaganda and scholarship that regulate public opinion, is *The Civil Rights Record: Black Americans and the Law, 1849-1970*, at viii (Richard Bardolph ed., 1970).

36. See Andrew Kull, *The Color-Blind Constitution* 67 (1992).

37. See William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 46-78 (1969).

38. See Balkin & Levinson, *supra* note 30, at 1016.

canon of race relations law. Commenting upon the provision of the Act, which attempted to bestow citizenship upon all native-born Americans regardless of race or previous condition of servitude, Johnson objected that such a policy "proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro."<sup>39</sup> Commenting upon the provision of the Act which mandated that states permit all persons to contract, sue, own property, and give evidence on the same terms as whites, Johnson objected that it sought to "establish, for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is, by the [Act], made to operate in favor of the colored and against the white race."<sup>40</sup> These comments, so strikingly resonant of contemporary struggles over affirmative action, indicate that the current debate has a longer lineage than is often supposed. Johnson's comments also suggest the alacrity with which some representatives of the white majority charge that measures seeking racial equality for long-oppressed racial minorities are instead illegitimate ventures into racial favoritism.

Third, I suggest that constructors of the canon of race relations law focus more attention than heretofore upon certain significant silences in the law. In addition to teaching, or at least alerting students to the presence of, the huge amount of constitutional, statutory, and administrative law that regulates race relations, a good course on the subject should also note and explore important lacunae. Silence can be as important as noise in law, as in life. The virtual absence of "noise"—law—regarding the rape of enslaved black women, for example, speaks volumes about the brutal reality of slavery; it signals that, for the most part, legal regimes left slave women unprotected against sexual violence. Similarly, the absence of a federal anti-lynching law speaks volumes about the tenor of race relations between the 1890s and the 1920s, a period during which hundreds of blacks were lynched annually under the tolerant gaze of a largely indifferent public. These silences need to be recognized and explored.

Another type of silence that warrants more attention is that which stems from the apparent desire of decisionmakers to ignore the racial element of a controversy even when that element is, in fact, a major presence in the controversy. Two examples of this phenomenon are *Bailey v. Alabama*<sup>41</sup> and *Frank v. Mangum*.<sup>42</sup> *Bailey* brought into question the validity of a state law that criminalized breaching a labor contract when the employee failed to repay an advance on wages.

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39. See Cong. Globe, 39th Cong., 1st Sess. 1857, 1858 (1866) (message from President Andrew Johnson).

40. *Id.* at 1859.

41. 219 U.S. 219 (1911).

42. 237 U.S. 309 (1915).

Racial sentiments played a key role in the enactment and administration of this statute—its purpose and effect was to intimidate black labor. In striking down the statute, however, the Court went out of its way to avoid mentioning the racial aspect of the case.<sup>43</sup> Similarly, racial sentiments played a key role in the miscarriage of justice that led to the rape conviction and later, the lynching of Leo Frank.<sup>44</sup> Accused of sexually abusing and murdering a white Christian teenager in the pencil factory he managed, Frank's Jewishness provoked a massive outpouring of anti-semitic fear, resentment, and hatred that transformed his "trial" into a spectacle. The prosecution of Leo Frank marked a high-point in the expression of anti-Jewish prejudice in America. Yet, in reading the Supreme Court decision that denied *habeas corpus* relief to Frank<sup>45</sup>—a major landmark in the history of the great writ—one would never know that anti-semitism had anything to do with the defendant's predicament. Silence of this sort and the reasons for it warrant notice and greater study in investigations of race relations law.

A fourth suggestion is that teachers of race relations law revisit subjects that were once significant but that are now largely unknown. An example is the caselaw that arose from the enforcement of anti-miscegenation statutes.<sup>46</sup> Over the course of three hundred years, some forty-one colonies, territories, or states prohibited marriage across racial lines. This generated an extraordinary array of fascinating cases in which judges had to answer questions such as: For purposes of deciding whether a couple was lawfully married, how should a judge determine whether a man or woman was "black" or "white?" In a jurisdiction prohibiting interracial marriage, should a judge enforce a will in which a white man bequeathed all of his property by deed of gift to his black mistress? What should happen if an interracial couple married in a state that permitted their union and then moved to a state that prohibited miscegenation?

The law created by these questions has largely disappeared from legal academic consciousness, though some of this law is being reconsidered because of its relevance to heated struggles today over same-sex marriage.<sup>47</sup> Virtually all that remains is the aptly titled case,

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43. See Alexander N. Bickel & Benno C. Schmidt, Jr., 9 *History of the Supreme Court of the United States: The Judiciary and Responsible Government 1910-21*, at 820-24 (1984).

44. See generally Leonard Dinnerstein, *The Leo Frank Case* (1968) (reviewing background to the case).

45. See *Frank*, 237 U.S. at 345.

46. See *supra* notes 16-23 and accompanying text.

47. See, e.g., David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. Pub. L.* 201, 204 (1998) (criticizing the analogy of anti-miscegenation laws to statutes proscribing same-sex marriages); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 *Tex. L. Rev.* 921, 962-75 (1998) (examining the public policy implications in the refusal to recognize same-sex marriages under the Defense of Marriage Act).

*Loving v. Virginia*,<sup>48</sup> in which the federal Supreme Court belatedly invalidated anti-miscegenation laws.<sup>49</sup> It is possible that a scholar who is familiar with the caselaw generated by enforcement of the anti-miscegenation laws would choose to forgo any investigation of this area insofar as it no longer gives rise to live legal disputes and insofar as there are other subjects that are, on balance, more worthwhile to study. It is also likely, however, that for many scholars, inattentiveness to prohibitions on interracial marriage reflects not a conscious decision respecting pedagogical priorities but mere ignorance; many scholars, particularly those born during or after the Civil Rights Revolution, are simply unaware of the human misery caused by anti-miscegenation statutes. Those who become aware of this facet of race relations law may decide that, given scarcities of time and energy, they are better off focusing attention on other matters. An informed decision, however, cannot be made without knowledge of this "lost" subject. Moreover, after gaining familiarity with it, some scholars may find that the anti-miscegenation caselaw is surprisingly relevant to contemporary concerns and therefore worthy of attention, even at the cost of spending less time on other matters.

Kindred to the problem of the lost subject is the problem of the lost case. Even within well-known, deeply-researched subjects, such as voting rights, there exist neglected cases which scholars ought to make more prominent. At the top of the list of such cases is *Giles v. Harris*,<sup>50</sup> a federal Supreme Court decision that should be essential reading in the canon of race relations law.<sup>51</sup> In *Giles*, in an opinion by

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48. 388 U.S. 1 (1967).

49. See *id.* at 12. Mention of *Loving* offers an opportunity to combat the tendency to focus excessively on the federal Supreme Court in derogation of state supreme courts and other lawmaking bodies. The Supreme Court confronted anti-miscegenation laws in 1967 near the end of the Civil Rights Revolution only after scores of state legislatures had repealed their prohibitions against interracial marriage. Nineteen years before Chief Justice Earl Warren's opinion for the federal Supreme Court in *Loving*, Judge Roger Traynor authored an opinion for the Supreme Court of California that invalidated on federal constitutional grounds that state's anti-miscegenation law. See *Perez v. Lippold*, 198 P.2d 17, 46 (Cal. 1948).

50. 189 U.S. 475 (1903).

51. I am not claiming to have discovered or rediscovered *Giles*. For valuable discussions of the historiography of the case, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon* (forthcoming 2000) (constitutional commentary). See also Derrick A. Bell, Jr., *Race Racism and American Law* 94, 516 (1973) (discussing *Giles*); Bickel & Schmidt, *supra* note 43, at 924-27 (same); Owen M. Fiss, *8 History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, at 372-79, 384, 391 (1993) (same). I am merely noting that the case lacks the salience that it should have and urging that arbiters of the race relations law canon redress this neglect.

A contributing reason, perhaps, for *Giles*'s obscurity is that the United States Supreme Court has dropped it from its own historical memory. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court presents a short history of efforts to evade or nullify the Fifteenth Amendment on its way to justifying as policy and upholding as a matter of constitutional law challenged provisions of the Voting Rights Act of 1965.

Justice Oliver Wendell Holmes, Jr., the Court assumed that the State of Alabama had embarked on a racial policy to exclude blacks from the ballot box in violation of the Fifteenth Amendment. Nonetheless, the Court declined to grant equitable relief to the plaintiffs. According to Justice Holmes, the complaint in *Giles*:

imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the [lists of eligible voters] will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.<sup>52</sup>

Written at the beginning of the twentieth century, the *Giles* decision sounded themes that resonate loudly at the opening of the twentieth-first century in ongoing struggles over race relations, federalism, and judicial power. Yet, as Professor Richard H. Pildes writes, "*Giles* has been airbrushed out of the constitutional canon."<sup>53</sup> As one of the most notable Supreme Court decisions in American constitutional history, a ruling fully as regrettable as *Plessy v. Ferguson*<sup>54</sup> or *Korematsu v. United States*,<sup>55</sup> the consequential egregiousness of *Giles* should be much better known than it is.

My fifth suggestion regarding the canon of race relations law scholarship stems from a basic question concerning the contours of the field: What should be the racial coverage of race relations law? As things currently stand, the black-white racial frontier continues to dominate the field for a variety of reasons. White-black racial conflict

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In the course of presenting this history, the Court relates its own history in the voting rights area. The Court, however, cites only those decisions in which it invalidates efforts aimed at excluding blacks from the franchise. See *id.* at 311-12. It reduces to invisibility decisions such as *Giles* or *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (insulating from constitutional attack a version of the white primary), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944), rulings in which the Court itself became complicit in nullifying the Fifteenth Amendment. Perhaps the Court intended its presentation of its history to further the struggle for racial justice by inventing a tradition of unbroken judicial solicitude for the rights of African Americans at the ballot box. Regardless of the motivation or strategy, scholars need to be aware that they cannot depend upon the Court to describe thoroughly its own institutional history. This is an important matter since teachers frequently use cases as historical narratives. It may be that one reason *Giles* has dropped from the legal academic canon is that it was dropped by the Justices from the Supreme Court's own canon.

52. *Giles*, 189 U.S. at 488.

53. Pildes, *supra* note 51.

54. 163 U.S. 537 (1896).

55. 323 U.S. 214 (1944).



has had more of an effect on broadly applicable law than any other racial conflict. White-red racial conflict has also generated a tremendous amount of law, much of which has been gathered together and organized under the rubric of Federal Indian Law.<sup>56</sup> All three branches of the federal government, however, have long treated the Indian tribes as a *sui generis* group for whom unique laws are appropriate. This sharply limits the applicability of decisions in that area of the law and concomitantly limits interest in that area. If the Fourteenth Amendment had been limited to the protection of blacks, it would be of far less concern to far fewer people than it is today. That Federal Indian law has been effectively segregated doctrinally in courts and in law schools both reflects and explains, at least in part, the isolation of Indian affairs from major currents of intellectual life in legal academia, including courses and books on race relations law. The splitting off of Federal Indian law from race relations law in general is a development and practice that ought to be reconsidered and undone. Considerable enlightenment about the (mis)-treatment of Indians and other non-white peoples could be generated by systematically exploring the differences in treatment accorded to these various groups. For example, at the same time that federal and state governments imposed racial separation on blacks, they imposed racial assimilation on Indians. This is an important juxtaposition to which more attention should be called. It suggests the variety with which racial prejudice can express itself and suggests, too, the variety of racial ideologies that vulnerable, racial minorities have had to confront. At the same time that many influential decisionmakers believed that Indians could be "saved" through a process of assimilationist whitening, these same decisionmakers saw blacks as irredeemably alien, incapable of assimilation, and thus fit only for a social existence safely distant from white society.

Alexis de Toqueville's comparative focus on whites, blacks, and Indians, what he called "the three races of America," enriched the bright and harsh light that he shed on race relations law in *Democracy in America*.<sup>57</sup> Writing in the 1830s, De Tocqueville demonstrated an admirable comprehensiveness in examining the inter-relationship of those three races.<sup>58</sup> Subsequently, however, many "races," including "yellow" people from China, Japan, and other Asian countries and "brown" people from Mexico, the Philippines, Hawaii, and other

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56. The most significant scholarly engagement in this field remains Felix S. Cohen's *Handbook of Federal Indian Law* (1942), a text that is canonical along several dimensions.

57. See 1 Alexis de Tocqueville, *Democracy in America* 337-42 (Henry Reeve trans., Colonial Press rev. ed. 1900) (1835).

58. See Randall Kennedy, *Tocqueville and Racial Conflict in America: A Comment*, 11 Harv. BlackLetter J. 145, 152 (1994).

places that have been gripped by American imperialism have peopled the United States.

States and the federal government in the United States have subjected people of color to all manner of racial abuses that have generated controversies that have spilled into legislatures and courts and given rise to a large body of law that ought to be part of the canon of race relations law. This is a relatively uncontroversial point; it is hard to imagine any course substantially concerned with race relations law that would fail to include for discussion *Yick Wo v. Hopkins*<sup>59</sup> or *Korematsu v. United States*.<sup>60</sup> At the same time, there is discernible, in legal academia and beyond, a growing impatience with analyses of race relations law that marginalize the history, participation, and concerns of people of color other than the white, black, and red.<sup>61</sup> This dissatisfaction is justified.<sup>62</sup> The United States is not simply a tri-racial society; it is a profoundly *multi-racial* society. Attending to that fact poses yet more problems for teachers and writers who already face daunting dilemmas of selectivity. That fact also indicates, however, the extraordinary possibilities latent in the field of race relations law—possibilities that await realization in the years ahead.

My sixth suggestion is that scholars of race relations law, and scholars in general, ought to canonize materials and techniques that clarify what actually happened as a consequence of a constitutional amendment, statutory provision, or judicial or administrative ruling. Too often, discussions of legal developments proceed on the assumption that realities mirror formal changes in rules. To some extent, reality does change whenever a lawmaking body renders a decision. Even if onlookers ignore the decision, the ruling itself changes the contours of law and thus effectuates a reform, albeit limited, that is worthy of notice. To that extent, no decision is totally hollow, and every decision is somewhat significant. Worthy of notice, too, is the degree to which social practices change as a consequence of judicial, legislative, or executive lawmaking. Too little study is devoted to this inquiry. To be sure, some investigation of the actual social consequences of lawmaking have been undertaken.<sup>63</sup> Even

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59. 118 U.S. 356 (1886).

60. 323 U.S. 214 (1944).

61. See generally, e.g., Symposium, *Race and Remedy in a Multicultural Society*, 47 Stan. L. Rev. 819 (1995) (especially Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 Stan. L. Rev. 957) (examining the "emergence of a new form of racial tension" due to an increase in racial diversity); *LatCrit: Latinas/os and the Law: A Joint Symposium by California Law Review and La Raza Law Journal*, 10 La Raza L.J. 1 (1998), 85 Cal. L. Rev. 1087 (1997) (encouraging "a LatCrit consciousness, community and literature within the contemporary legal culture of the United States").

62. I have been insufficiently attentive to the full panoply of race matters in my own work. See Viet D. Dinh, *Races, Crime, and the Law*, 111 Harv. L. Rev. 1289, 1289-90 (1998) (reviewing Randall Kennedy, *Race, Crime, and the Law*).

63. See, e.g., Clear and Convincing Evidence: Measurement of Discrimination in

when they exist, however, such studies receive too little attention in the legal academic canon.

### III.

I turn now to the question: With what political and pedagogical attitude should a course on race relations be taught? I approach this inquiry with some trepidation because my own attitude—or at least my perceived attitude—has been harshly criticized. In *The Strange Career of Randall Kennedy*, Professor Derrick Bell expresses regret that I became his successor as the teacher of the basic course on race relations law at Harvard Law School.<sup>64</sup> He maintains that I started off my teaching and scholarly career on the right track, stating that my “first few articles were stunning models of racial advocacy,”<sup>65</sup> “hard-hitting writing filled with bite and passion.”<sup>66</sup> They seemed to foretell, he continued, that I “would become a powerful voice for a people whose expectations that the civil rights era would gain its racial justice goals were fading fast.”<sup>67</sup> But then, in his view, I took a wrong turn. I became “impartial” and all too ready to criticize publicly righteous positions embraced by champions of civil rights.<sup>68</sup> According to Bell, I seemed to have forgotten whose side I was on and comported myself intellectually “in ways that—whether intended or not—serve to

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America (Michael Fix & Raymond J. Struyk eds., 1993) (publishing findings from auditing studies of discrimination in housing, lending, employment, and other areas); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 7-14 (1984) (outlining the difficulties in measuring the effects of a court's holdings on society); John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 984 (1991) (citing “a need for reevaluating employment discrimination policy”); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 10 (1994) (arguing that social, political, and economic factors contributed to a change in race relations); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 6-7 (1996) (arguing the influence of various factors on the transformation of constitutional law); Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 484-502 (1996) (examining the many factors utilized in peremptory challenges); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J.L. Reform 229, 235-75 (1993) (analyzing cases dealing with preemptory challenges after *Batson* and concluding that prosecutors actually preempt jurors based on race although they provide another reason).

64. See Derrick Bell, *The Strange Career of Randall Kennedy*, New Politics, Summer 1998, at 55.

65. *Id.* at 56. The articles to which he refers are Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327 (1986); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 Colum. L. Rev. 1622 (1986). See Bell, *supra* note 64, at 66-67.

66. Bell, *supra* note 64, at 66.

67. *Id.* at 56.

68. *Id.*

comfort many whites and distress blacks.”<sup>69</sup> “Disgruntled students complained,” Bell reports, “that Kennedy spent more time challenging and even denigrating civil rights positions than he did analyzing the continuing practices and policies of discrimination that made those policies, whatever their shortcomings, necessary.”<sup>70</sup>

Bell’s critique raises a variety of fundamental issues. First, by charging that I have abandoned the “advocacy orientation” of the course that he bequeathed to me, Bell implicitly asserts that a course on race relations law—and perhaps all courses—should be taught with an advocacy orientation. Unfortunately, Professor Bell neglects to define clearly what he means by advocacy orientation. I believe that what he means to refer to is an attitude of engagement in which the teacher is seeking to change the world, at least a bit, by shaping the perspectives of his or her students. An advocacy orientation is a commitment to challenge unjust aspects of the status quo and recommend needed reforms, no matter how radical. If this is what Professor Bell means by an “advocacy orientation”—and I think it is—then he and I agree on a fundamental point. Professors in every law school class are constantly, indeed unavoidably, taking a position, either implicitly or explicitly, with respect to the legitimacy or illegitimacy of the system of law they are attempting to analyze. Professor Bell wants his colleagues to be conscious of the political stances that they take in their books, articles, lectures, and other pedagogical tasks, including letters of recommendation and votes for tenure. I applaud his realistic appraisal of the unavoidably political elements of pedagogy and his insistence on a high degree of ideological self-awareness. Where, then, do we disagree in ways relevant to constructing a course on race relations law? Conflicts arise in a variety of areas, three of which are particularly important.

First, Bell is supremely confident that he knows what policy positions are *the* correct civil rights positions to adopt and thus the

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69. *Id.* at 57. To preclude charges that I have quoted Professor Bell “out of context,” I shall offer a full paragraph of his comments:

Kennedy, like Thurgood Marshall, is a contrarian. He loves to argue and play the devil’s advocate. This is a useful talent in the classroom and is quite helpful in fine-tuning litigation strategies. Justice Marshall, though, never forgot whose side he was on, particularly in public proclamations as opposed to private discourse. In public, he was the ultimate advocate for the black cause as reflected in his civil rights career and his judicial tenure. Kennedy, on the other hand, is quite willing to take his differences with black people public in ways that—whether intended or not—serve to comfort many whites and distress blacks. It is not that his criticisms are new. White conservatives have made similar arguments and worse. It is that he is relinquishing a much needed advocacy role and taking positions that render him an apologist [for aspects of a system] that are less overtly racist than in earlier times but no less ominous in the threat they pose for all blacks.

*Id.* (footnote omitted).

70. *Id.* at 56.

ones to urge his students to follow. Because Bell is so confident, he is impatient with others who lack his certitude. He displays this impatience by routinely portraying opponents as either racists or opportunists. I lack his certitude and believe that there is good reason to be open-minded about a variety of hotly-contested debates regarding race relations policy. I therefore believe that a well-constructed course on race relations law should provide room for a patient, tolerant exploration of alternative resolutions to the dilemmas we face.

It is ironic, in the extreme, for me to be advocating a patient, tolerant exploration of alternative positions in race relations in response to Professor Bell. After all, one of his signal contributions to the legal academic literature is *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*,<sup>71</sup> which sharply questioned the propriety of civil rights attorneys pressing for one sort of remedy in school desegregation cases while their putative clients seemed to prefer a different sort of remedy. "The time has come," Professor Bell concluded, "for civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent."<sup>72</sup> Some circles considered Bell's article heretical.<sup>73</sup> Indeed, to some, unfortunately, it was cause for political and intellectual excommunication. Wherever one stands on the merits of the dispute, however, the important point here is that Bell was a participant in a bona fide dispute between bona fide champions of African American advancement over the best strategy to pursue. Then, as well as now, properly determining how best to proceed took more than an emotional commitment to "doing the right thing." It also required an intellectual investment to figure out what constituted doing the right thing, a task that is even more complicated today than it was in 1973 when Professor Bell published the first edition of *Race, Racism and American Law*, a wonderful compendium of source material for which all scholars owe him a large intellectual debt.

A properly constructed course on race relations law at the dawn of the twenty-first century should provide students with educational materials and psychological space so that they can determine for themselves appropriate responses to a host of vexing dilemmas. Some champions of African American advancement, for example, maintain that for purposes of fully enforcing anti-discrimination norms, black workers within majority-white unions should be able to negotiate with or challenge employers independently of their union bureaucracies. Their fear, of course, is that the officials of such unions will be

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71. 85 Yale L.J. 470 (1976).

72. *Id.* at 516.

73. See Nathaniel R. Jones, Correspondence, *School Desegregation*, 86 Yale L.J. 378, 381 (1976).

insufficiently aggressive in protecting the interests of black workers. Arguing in favor of this position, a dissenting judge declared in 1974 that

TO LEAVE NON-WHITES AT THE MERCY OF WHITES IN THE PRESENTATION OF NON-WHITE CLAIMS WHICH ARE ADMITTEDLY ADVERSE TO THE WHITES WOULD BE A MOCKERY OF DEMOCRACY.... IN PRESENTING NON-WHITE ISSUES NON-WHITES CANNOT, AGAINST THEIR WILL, BE RELEGATED TO WHITE SPOKESMEN, MIMICKING BLACK MEN. THE DAY OF THE MINSTREL SHOW IS OVER.<sup>74</sup>

When the ruling to which this judge dissented was appealed to the Supreme Court of the United States, the National Association for the Advancement of Colored People ("NAACP"), the single most influential black defense organization in American history, backed his stance. The Supreme Court, however, rejected this stance. More significantly, for our purposes, the Justice who wrote the opinion for the Court was none other than Justice Thurgood Marshall, "Mr. Civil Rights." Disagreeing with the NAACP, Justice Marshall believed that a correct reading of the applicable labor law required deference to union control over the presentation of worker grievances—including complaints by black workers of racial discrimination. He also believed that black workers in unions would generally be better off by playing within the established groundrules of the labor movement, even if this meant subordinating their special grievances to the overall goals of the unions representing them.<sup>75</sup> That Marshall, America's first black Supreme Court justice, wrote the Court's opinion does not make that ruling right or even necessarily in the best interest of blacks. It is safe to say, though, that Thurgood Marshall would not favor the perpetuation of a minstrel show.

There are many other areas in which people who are thoroughly committed to advancing the interests of blacks disagree over how best to proceed. Some champions of African American uplift urge rejection of the integrationist approach to racial equity in educational opportunities that prevailed during much of the civil rights era of the 1950s and 1960s.<sup>76</sup> Others, however, counsel embracing integrationist

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74. *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 940 (1973) (Wyzanski, J., dissenting).

75. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 67-70 (1975). This issue remains contentious. See Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 Iowa L. Rev. 1339, 1353 (1997).

76. See Bell, *supra* note 51, at 574-605; Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1, 6 (1992); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 Cal. L. Rev. 1401, 1406-32 (1993). Some of the sentiments that nourish this perspective have deep historical roots. See

strategies.<sup>77</sup> Some champions of black advancement argue in favor of seeking better housing and other opportunities by encouraging the dispersal of black ghetto-dwellers.<sup>78</sup> Others, by contrast, argue in favor of consolidating the strength of black ghettos and bringing greater opportunities to inner-city blacks where they already reside.<sup>79</sup> Debates rage over whether, for blacks, it is better to elect as many black representatives as possible from majority-black voting districts or to more fully spread the influence of black voters, even at the cost of sacrificing dominance in a certain number of voting districts;<sup>80</sup> whether it is better to invest more in securing public safety in high-crime, majority-minority neighborhoods (even at the cost of encroaching upon personal privacy), or to insist that residents of such neighborhoods be accorded the same degree of privacy afforded to residents of safer, whiter, more affluent neighborhoods;<sup>81</sup> whether it is better to prefer to place black orphaned children in black adoptive families or to stipulate that such children will be placed in the first adoptive home available, regardless of race;<sup>82</sup> whether redistributive

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W.E. Burghardt DuBois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 329 (1935); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. Rev. 677, 697 (1997).

77. See, e.g., Gary Orfield et al., *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 345-46 (1996) (suggesting ways "to move toward integration").

78. See, e.g., Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1328-41 (1995) (arguing that enforcing laws against discrimination in housing could solve the problem of racial segregation).

79. See, e.g., John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair"*, 143 U. Pa. L. Rev. 1233, 1271-72 (1995) (arguing that a grassroots approach from within the community may be a better way to improve the quality of life for people of color).

80. See David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 87-97 (1997); Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1386-89 (1995) (reviewing *Quiet Revolution in the South* (Chandler Davidson & Bernard Grofman eds., 1994)).

81. Consider the debate between Tracey Meares and Dan Kahan, both of whom argue in favor of enhancing police authority for the benefit of crime-ravaged and impoverished minority communities, and more traditional civil libertarians who see enhanced police power as a likely menace to racial minorities. Compare Tracey L. Meares & Dan M. Kahan, *Urgent Times: Policing and Rights in Inner-City Communities* 3-6 (Joshua Cohen & Joel Rogers eds., 1999) (stating that many inner-city residents support increased law enforcement measures to combat crime), with David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 Geo. L.J. 1059, 1062-63 (1999) (arguing that the negative effects of aggressive policing may outweigh the benefits gained by inner-city communities), and Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 835-36 (1999) (arguing that vague loitering laws "reinforce[] stereotypes that portray Blacks as lawless and legitimate police harassment in Black communities," thus eroding "constitutional safeguards against race-based police abuse").

82. Some commentators fervently believe that it is in the best interest of orphaned black children for the state to attempt to place them for adoption with black adults.

reforms primarily animated by a desire to help blacks are best packaged as race-specific or race-neutral.<sup>83</sup> A course on race relations law should make clear that enlightened, non-racist activists, jurists, and commentators can be found on several sides of these controversies. Contrary to Professor Bell's rhetoric, these issues are not, forgive the expression, black and white. They are multi-dimensional and should be portrayed, seen, and dealt with as such.

A second broad area of pedagogical conflict between Professor Bell

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See James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. Fam. L. 487, 514-15 (1987); Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 J. Fam. L. 201, 217-18 (1998); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. Pub. Int. L.J. 409, 417-18 (1997). Other commentators fervently believe that it is a terrible disservice to black orphans for the state to attempt to place them for adoption with black adults, given the delays and other problems that such efforts cause. See Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* 92-93 (1993); Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* 135-40 (1999); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 Mich. L. Rev. 925, 966-67 (1994); Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, Am. Prospect, Spring 1994, at 38, 38-42.

83. Among those on the leftwards side of the political spectrum support for race-specific reforms is broad and intense. See, e.g., Christopher Edley, Jr., *Not All Black and White: Affirmative Action, Race, and American Values* 278 (1996) (supporting, maintaining, and reforming a national affirmative action policy); Charles R. Lawrence III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* 1 (1997) (defending affirmative action as an affirmation of democratic values); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. Colo. L. Rev. 841, 843-44 (1997) (arguing for race-based affirmative action in criminal law); A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593, 1644 (1994) (arguing that the Supreme Court's rejection of majority-minority districts is fundamentally flawed); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705, 705 (arguing that "large scale affirmative action would improve the quality and increase the value of legal scholarship"). There are progressives, however, who have expressed doubts about whether race-specific policies will broadly advance the interests of most African Americans. See, e.g., Randall Kennedy, *supra* note \*, at 29-135; William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* 115 (1987) (stating that race- or ethnicity-based affirmative action would "enhance the opportunities of the more advantaged without addressing the problems of the truly disadvantaged").

On the rightwards end of the political spectrum there exists substantial literature that argues that race-specific social policies, albeit well-intentioned, negatively affect their presumed beneficiaries. See, e.g., Shelby Steele, *The Content of Our Character: A New Vision of Race in America* 113 (1990) ("I think affirmative action has shown itself to be more bad than good and that blacks . . . now stand to lose more from it than they gain."); Antonin Scalia, *The Disease as Cure: "In order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 Wash. U. L.Q. 147, 156 (opposing "racial affirmative action for reasons of both principal and practicality"); Glenn C. Loury, *Beyond Civil Rights*, The New Republic, Oct. 7, 1985, at 22, 22 (arguing that the broad application of the civil rights strategies to cases of "differential achievement between blacks and whites threatens to make it impossible for blacks to achieve full equality").



and me arises from differing premises concerning the normative aims of a course on race relations law. He seems to assume that its aim should be to advance the interests of black people. As I indicated above, what actually constitutes the best interests of black people is more contested and more difficult to discern than Bell's rhetoric suggests. But even if a broad consensus among African Americans was reached over what constituted the best interest of black people, major difficulties would still loom over an approach, like Bell's, which measures the political virtue of any given policy in terms of "Is it good for the blacks?" Blacks, after all, constitute only one portion of the American polity. What is good for that portion will likely often be good for the whole or good for social justice in general, but that need not always be the case. The interests of blacks might come into conflict with the interests of other groups whose claims in a given situation are more pressing or weighty than those of blacks. When that happens, I see no reason to prefer the position of blacks, just as I see no reason to prefer *necessarily* the position of whites, Jews, Catholics, or any other particular social group.<sup>84</sup> A good course on race relations law in the United States would show that any group, like any person, is capable of perpetrating racial harms upon others. It would show how people of Chinese ancestry have attempted to deflect anti-Asian animus by scapegoating Indians and blacks;<sup>85</sup> how some Indians enslaved African Americans even as they themselves were being cruelly ousted from their lands by Euro-Americans;<sup>86</sup> how people of African ancestry have attempted to escape anti-Black

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84. See Randall Kennedy, *My Race Problem—And Ours*, Atlantic Monthly, May 1997, at 55, 64-65.

85. In *People v. Hall*, 4 Cal. 399, 404-05 (1854), the California Supreme Court ruled that state law excluded Chinese, along with blacks and Indians, from testifying against whites. In the course of its decision the Court described Chinese as "[a people] whose mendacity is proverbial; a race . . . nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point." *Id.* at 405. A prominent Chinese merchant responded in the following terms: "[The whites] have come to the conclusion that we Chinese are the same as Indians and Negroes . . . . And yet these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and [in] caves." Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 Cal. L. Rev. 529, 550 (1984) (second alteration in original) (footnote omitted). The Chinese merchant argued, in other words, that it was understandable to exclude Indians and blacks from the witness stand but an injustice to do the same to people of Chinese ancestry.

86. See Annie Heloise Abel, *The American Indian as Slaveholder and Secessionist* 1-5 (University Neb. Press 1992) (1915); Theda Perdue, *Slavery and the Evolution of Cherokee Society, 1540-1866*, at 38-39, 66 (1979); Kathryn E. Holland Braund, *The Creek Indians, Blacks, and Slavery*, 57 J. S. Hist. 601, 601-02, 616-18. (1991); C. Calvin Smith, *The Oppressed Oppressors: Negro Slavery Among the Choctaw Indians of Oklahoma*, 2 Red River Valley Hist. Rev. 240, 240-41 (1975); William S. Willis, *Divide and Rule: Red, White, and Black in the Southeast*, 48 J. Negro Hist. 157, 168-73 (1963).

animus by scapegoating Indians;<sup>87</sup> how Jews have attempted to escape anti-Semitism by scapegoating Negroes;<sup>88</sup> how some African Americans have racially-targeted Korean Americans;<sup>89</sup> and how, of course, whites of various ethnicities have attempted systematically to subordinate blacks and other people's of color.

Professor Bell is really interested only in the last of these topics. For example, when one looks up the key term "racism" in the third edition of *Race, Racism and American Law*, one finds the following entry: "Racism—See White racism."<sup>90</sup> This elliptical comment stems from a theory that has, unfortunately, been gaining influence steadily over the past thirty years. Under that theory, blacks and other racially oppressed peoples cannot be "racist" because "racism" can only be manifested by groups with power. According to this theory, "racism" equals prejudice plus power. According to proponents of this theory, blacks can be prejudiced, but blacks cannot be racists because they lack the power to effectuate the prejudices they may harbor.

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87. In 1914, a group of African Americans rightly objected to an Oklahoma statute that authorized railroads to provide first class service only to whites. They prevailed in the United States Supreme Court, which ruled that the statute in question violated the formal equality under which *de jure* segregation was justified. See *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 161-62 (1914). Unfortunately, in the course of pleading their case, they participated in the unjustified vilification of other oppressed people. Complaining that Indians were protected from exclusion while blacks were not, the plaintiffs objected that Indians are "far more vicious as well as unclean and unhealthy . . ." Bickel & Schmidt, *supra* note 43, at 778 n.146 (quoting Brief for Appellants at 50-51, *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914)).

88. In an effort to defend Leo Frank against rape charges, see *supra* note 44 and accompanying text, supporters pointed to a black man who should have been a prime suspect. They attempted to foment anger against him by resorting to racist, anti-black stereotypes that depict black men as rapacious sexual beasts. A sign of the extraordinary character of the animus against Frank is that the Negro-baiting tactics of his defenders failed. They "expressed outrage that a white employer was indicted, rather than a black worker with a criminal record, and shock that their appeals to white supremacy failed to rally the jury or the public." Nancy MacLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, 78 J. Am. Hist. 917, 925 (1991). Many blacks reacted angrily to this attempt to supercede anti-Jewish prejudice with anti-black bigotry. See Eugene Levy, "Is the Jew a White Man?": Press Reaction to the Leo Frank Case, 1913-1915, 35 *Phylon* 212, 215-18 (1974).

89. See Kwang Chung Kim & Shin Kim, *The Multiracial Nature of Los Angeles Unrest in 1992*, in *Koreans in the Hood: Conflict with African Americans* 17, 34 (Kwang Chung Kim ed., 1999) [hereinafter *Koreans in the Hood*]; Heon Cheol Lee, *Conflict Between Korean Merchants and Black Customers: A Structural Analysis*, in *Koreans in the Hood*, *supra*, at 113, 114; Pyong Gap Min & Andrew Kolodny, *The Middleman Minority Characteristics of Korean Immigrants in the United States*, in *Koreans in the Hood*, *supra*, at 131, 144-49.

90. Derrick Bell, *Race, Racism and American Law* 683 (3d ed. 1992). It should be noted that in the fourth edition of *Race, Racism and American Law*, Professor Bell changes "White racism" to "American racism." Derrick Bell, *Race, Racism and American Law* 1029 (4th ed. 2000). All things considered, however, one doubts that this emendation signals a significant transformation in his outlook.

Materials that should be part of a good course on race relations law—sociological materials on the racial demographics of authority within the society—would enable a student to see the speciousness of this theory. They would enable a student to demystify the myth of black powerlessness. For the fact is that in an appreciable number of significant locales and institutions, blacks do occupy positions of authority from which they could, if they so chose, use their power to effectuate prejudices. Scores of cities, police departments, military units, prisons, personnel offices, and social service agencies are directed by black officials who, like their white counterparts, make numerous low-visibility, discretionary choices that are routinely granted tremendous deference both within and without the bureaucracies in which they function.

Furthermore, under certain circumstances, even weak individuals or groups can exercise power over others who, in the normal course of things, occupy a higher social status. I think here of the lowly rapist or a group of historically-victimized rapists. I think of what happened to a thirty-year old woman whose assailant, before raping her, told her that before she died he would make sure that she knew what it felt like to “have a nigger cock.”<sup>91</sup> I think, too, of what happened to Kristin Huggins, the victim of a rape-murder in 1992 at the hands of Ambrose A. Harris. Harris and an associate agreed to perpetrate a car-jacking so that they would have an automobile with which to commit a robbery they were planning. Offering clarification as to what would be done with inconvenient prisoners, Harris reportedly said that he would “‘tie them up and leave them somewhere’ if they were black. . . . [but] would kill them if they were white.”<sup>92</sup> When Huggins unluckily drove her car near Harris, he is said to have muttered “I’m going to get that bitch.”<sup>93</sup> Finally, I think of a tragedy that occurred in 1992, near Charleston, South Carolina. Four black men abducted a white woman, Melissa McLauchlin, raped her, and then killed her. Seeking to explain their actions, one of the perpetrators stated that it constituted retaliation for “four hundred years of oppression.”<sup>94</sup>

Beyond the empirical fact that blacks can and do exercise appreciable amounts of power in America, even while they remain subjected to invidious and intolerable racial subordination, is the additional fact that circumstances sometimes change with breathtaking rapidity, empowering those who have been oppressed and lowering those who have been ascendant. It is important, then, to

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91. *Reynolds v. Commonwealth*, 367 S.E.2d 176, 178 (Va. Ct. App. 1988).

92. *State v. Harris*, 716 A.2d 458, 465 (N.J. 1998) (footnote omitted).

93. *Id.*

94. Chris Sosnowski, *Death Penalty to be Sought for Gardner*, Post & Courier, Apr. 14, 1995, at A21; see also Richard Green, Jr., *Trials Are Judge's Swan Song*, Post & Courier, Mar. 2, 1998, at A1 (summarizing the crime).

be attentive to the moral hygiene of the weak. World history shows quite vividly that persons and groups who have been dealt with unjustly—I think, for example, of certain Serbs and Jews—are quite capable of donning cloaks of victimhood and visiting terrible injustices on others.

Given these considerations, teachers of courses on race relations law in the United States should definitely be self-conscious as they proceed to advocate favored policies; otherwise they will simply proceed to be *unselfconscious* advocates. In advocating one policy, doctrine, or outcome over others, however, a teacher's conclusion should rest on a firmer foundation than that it advances the fortunes of the race with which the teacher happens to identify. Thus, knowing the racial demographics of who a given policy helped or hurt, or who now supports or opposes a given reform, is an insufficient basis for judging its propriety. An appropriate basis is whether the policy, doctrine, or outcome satisfies a conception of justice that is broader, grander, and more attractive than the simple preferences, racial identity, or naked subjectivity of the teacher in charge.

Professors should also keep in mind that even amongst those united in their desire to achieve "racial justice," the way towards that goal is not at all clear. People differ over what they mean by racial justice. Some mean preventing all forms of private or public racial discrimination. Some mean preventing all forms of invidious racial discrimination. Some mean preventing all forms of invidious racial discrimination *and* redressing the discernible vestiges of racial wrongs done in the past. On the other hand, some mean merely prohibiting governments from engaging in invidious racial discrimination, while expressly permitting private parties to do so. Furthermore, even people who embrace one of these competing visions of racial justice differ over which strategies to pursue to reach their agreed ends. Against this backdrop of complexity, flux, and contestation, teachers ought to inculcate within students a willingness to experiment, an appreciation for empirical research that might shed light on the actual consequences of various policies, and a tolerance for listening closely to competing views.